

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD**

JOHN W. FARQUHAR,
Appellant,

v.

DEPARTMENT OF THE AIR FORCE,
Agency.

DOCKET NUMBER
AT-0351-98-0224-I-2

DATE: JUN 3 1999

Andrew L. Colvin, Panama City, Florida, for the appellant.

Captain Kristine Hoffman, Esquire, and Captain Thomas D. Veltz, Esquire,
Tyndall Air Force Base, Florida, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 The appellant petitions for review of the November 12, 1998 initial decision that affirmed the appellant's demotion during a reduction in force (RIF). For the reasons set forth below, we GRANT the petition, VACATE that portion of the initial decision that rejected the appellant's disability discrimination claim, and REMAND the appeal to the regional office for further adjudication consistent with this Opinion and Order.¹

¹ Following submission of his petition for review, the appellant filed an amended petition. Refiled Petition for Review (RPFR) File, Tab 3. However, because the amended petition was

BACKGROUND

¶2 The appellant served as a Facilities Maintenance Controller, GS-1601-07, at Tyndall Air Force Base, Florida. Initial Appeal File (IAF), Tab 1 at 2. On September 30, 1997, the agency informed the appellant that it was abolishing his position as a result of a decision to award the work performed by certain federal employees to private contractors. Refiled Appeal File (RAF), Tab 13, Subtab 4m. The agency provided the appellant with a RIF notice and offered him a position as an Automotive Equipment Dispatcher, GS-2151-05, which the appellant accepted. *Id.* The agency detailed the appellant to this position during his 60-day RIF notice period. RAF, Tab 13, Subtab 4l. At least as early as October 17, 1997, the appellant informed the agency that he was having difficulty in his detailed position due to job-related stress. *Id.* The agency referred the appellant to the Flight Surgeon's office for a medical examination, and the appellant also consulted a private physician. RAF, Tab 13, Subtabs 4i, 4j. The federal medical officer stated that the appellant could be retained in the detailed position and should be treated for anxiety disorder. RAF, Tab 13, Subtab 4j. The appellant's physician, however, concluded that the appellant was permanently disqualified for the position. RAF, Tab 13, Subtab 4i.

¶3 On November 26, 1997, the agency offered the appellant a temporary position as a Housing Management Assistant, GS-1173-07. RAF, Tab 13, Subtab 4l. Although the agency originally told the appellant that he would have to make a

filed more than 35 days after the date of issuance of the initial decision and was unaccompanied by a motion that shows good cause for the untimely filing, we have not considered the amended petition for review. 5 C.F.R. § 1201.114(f). For the same reason, we have not considered the agency's untimely response to the petition for review. Although the agency asserts that its response was timely because it was filed within 25 days after the service of the appellant's amended petition, RPFR File, Tab 5 at 3, the agency also acknowledges receipt of a memorandum from the Board informing the agency that its response must be filed on or before January 11, 1999, RPFR File, Tab 4. The agency filed its response on January 21, 1999. RPFR File, Tab 5.

decision concerning this offer by 4:30 p.m. that afternoon, RAF, Tab 13, Subtab 4k, it extended the decision period to January 5, 1998, after learning that the appellant had been hospitalized and was under a doctor's care due to stress, RAF, Tab 13, Subtab 4l. The appellant filed an appeal with the Board's Atlanta Regional Office on December 10, 1997, in which he alleged that the agency committed harmful error, and he further alleged reprisal for having filed a grievance, as well as age and disability discrimination, as affirmative defenses. IAF, Tab 1. The appellant accepted the temporary GS-07 position on December 29, 1997. IAF, Tab 7, Subtab 4b.

¶4 On March 2, 1998, the agency rescinded the RIF action against the appellant and presented him with a new 60-day notice period. IAF, Tab 15. The agency offered the appellant his choice of two assignments which included the temporary GS-07 position as Housing Management Assistant and a permanent GS-04 position as a Telephone Operator. *Id.* Although the agency restored the appellant to his original position, it detailed him to the temporary GS-07 position pending completion of the notice period. IAF, Tab 16. Although the administrative judge noted that the agency's rescission of the original RIF action did not render the appeal moot due to the appellant's outstanding claims of age and disability discrimination, she dismissed the appeal without prejudice on her own motion. IAF, Tab 19, Initial Decision (ID) at 3. The administrative judge informed the appellant that she would allow him to present any nonfrivolous discrimination claims that he could have presented in the original appeal when he refiled his appeal from the then yet to be effected RIF. ID at 3. On April 28, 1998, due to medical restrictions that precluded the appellant's placement into the permanent GS-04 position the agency had offered him on March 2, 1998, the agency amended the RIF notice to offer the appellant the position of Library Technician, GS-1411-04. RAF, Tab 13, Subtab 4f. The agency officially assigned the appellant to this position on June 21, 1998. RAF, Tab 13, Subtab 4d.

¶5 On June 3, 1998, the appellant filed a timely petition for review of the initial decision that dismissed his appeal without prejudice. Petition for Review File (PFR) File, Tab 1. He argued that he was entitled to a hearing and that the administrative judge erred in failing to address his age and disability discrimination claims. *Id.* On June 30, 1998, the Clerk of the Board notified the appellant that it was forwarding the petition for review to the Board's Atlanta Regional Office for adjudication since it was clear that the appellant's intent was to refile his petition for appeal rather than to file a petition for review. PFR File, Tab 4. The appellant, however, had already filed a new appeal with the regional office on June 15, 1998. RAF, Tab 1. Although the appellant alleged reprisal for having filed a Board appeal and a congressional complaint as an affirmative defense in the newly filed appeal, he did not raise any discrimination claims. *Id.*

¶6 Despite the fact that the administrative judge informed the appellant that he could present any nonfrivolous discrimination claims that he could have presented in the original appeal, ID at 3, the administrative judge did not allow the appellant to raise these claims during his subsequent appeal. RAF, Tab 18, Refile Initial Decision (RID) at 3. The administrative judge rejected the appellant's disability discrimination claim on the basis that the Department of Labor, Office of Workers' Compensation Programs (OWCP) was the agency to which the appellant should have addressed his claim. RID at 3. With regard to his other discrimination claims, the administrative judge ruled that the appellant abandoned these claims because he did not raise them again during the prehearing conference conducted after the appellant filed his second appeal. RID at 3.

¶7 Following a hearing, the administrative judge affirmed the appellant's demotion to the GS-04 Library Technician position upon finding that the agency established (1) that it invoked the RIF regulations for a permissible reason, and (2) that it properly considered the appellant's assignment rights. RID at 7, 9. The appellant filed a timely petition for review in which he argues, inter alia, that the

administrative judge erred when she denied him the right to raise discrimination matters at the hearing. Refiled Petition for Review (RPFR) File, Tab 1.

ANALYSIS

¶8 We affirm the administrative judge's findings on both the merits of the appellant's demotion as the result of a RIF and the appellant's affirmative defense of reprisal for having filed a grievance and an appeal with the Board. The initial decision reflects that the administrative judge considered the evidence as a whole, drew appropriate inferences, and made reasoned conclusions on issues of credibility. Because the appellant's petition for review fails to identify any internal inconsistency or inherent improbability in the administrative judge's fact findings or other basis sufficient to overcome the special deference which reviewing bodies must necessarily accord the factual determinations of the original trier of fact, we will not disturb the administrative judge's conclusions. *Broughton v. Department of Health & Human Services*, 33 M.S.P.R. 357, 359 (1987). Nevertheless, for the reasons set forth below, we vacate that part of the initial decision that dismissed the appellant's disability discrimination claim without a hearing and remand this appeal to the Atlanta Regional Office to provide the appellant a hearing concerning this claim.

¶9 In his original appeal form, the appellant alleged that his demotion to the GS-05 Automotive Equipment Dispatcher position "resulted in an ultimate mental breakdown on 26 Nov 97." IAF, Tab 1. As discussed earlier, the appellant was hospitalized on November 26, 1997, due to stress. RAF, Tab 13, Subtab 4l. In his request for relief, the appellant asked the Board to order the agency "to pay ... all cost associated with the harm caused by this action." In addition, in the "Appellant's Motion for Certification and of an Interlocutory Appeal," the appellant alleged that he had an outstanding damage claim against the agency because he was hospitalized due to the agency's failure to train him. IAF, Tab 17 at 3-4. Thus, we find that the appellant indicated a desire to seek compensatory

damages with respect to his disability discrimination claim.² *See Yates v. U.S. Postal Service*, 70 M.S.P.R. 172, 180 (1996) (appellant indicated a desire to seek compensatory damages when his petition for appeal stated that he suffered family and mental stress, and anxiety, and that he had been harmed due to lost income and health insurance, and the appellant sought “all other just and appropriate relief”). Therefore, the administrative judge was correct in concluding that the agency’s rescission of the first RIF action did not moot the appellant’s original appeal. *See Currier v. U.S. Postal Service*, 72 M.S.P.R. 191, 197 (1996) (where an appellant has outstanding, viable claims for compensatory damages before the Board, the mere rescission of the action does not render the appeal moot).

¶10 The administrative judge erred, however, in preventing the appellant from raising the disability discrimination issue during the hearing. The administrative judge apparently concluded that the appellant should have directed this claim to OWCP because the appellant alleged that the injury he suffered was work-related as a result of his assignment to the Automotive Equipment Dispatcher position. RID at 3. However, the fact that the appellant may be awarded benefits by OWCP under the Federal Employees’ Compensation Act (FECA) would not defeat his compensatory damages claim if he proves that the agency discriminated against him in violation of the Rehabilitation Act of 1973 or the Americans with

² The Board’s regulations now require requests for compensatory damages to be in writing and to state the amount of damages sought and the reasons why the appellant believes he is entitled to an award under the applicable statutory standard. 5 C.F.R. § 1201.204(b) (63 Fed. Reg. 41,177, 41,180 (1998)). However, because the appellant filed his original appeal prior to the date on which this regulation went into effect, and the retroactive application of this regulation could impair the appellant’s right to request compensatory damages, we have not applied the regulation so as to preclude the appellant’s compensatory damages claim in this appeal. *See Landgraf v. USI Film Products*, 511 U.S. 244, 280 (1994) (there is a presumption against the retroactive application of a statute if such application would impair a right a party possessed when he acted); *see also Terrell v. Department of the Treasury*, 73 M.S.P.R. 689, 692 (1997) (analogizing *Landgraf* analysis to a determination concerning retroactive effect of a change in the Board’s regulations).

Disabilities Act of 1990 (ADA). *See Sloan v. U.S. Postal Service*, 77 M.S.P.R. 58, 69-70 (1997) (an individual who has received a FECA award for pecuniary losses caused by workplace discrimination can also claim compensatory damages for non-pecuniary losses caused by the discrimination under Title VII of the Civil Rights Act of 1964, even though both the pecuniary and non-pecuniary losses may be connected to the same discrimination-caused or exacerbated injury); *Currier*, 72 M.S.P.R. at 196 (the Civil Rights Act of 1991, 42 U.S.C. § 1981a, which allows for the award of compensatory damages under Title VII, also allows for the award of compensatory damages for violations of the Rehabilitation Act and the ADA). Thus, the administrative judge erred in dismissing the appellant's disability discrimination claim.

¶11 With respect to the additional discrimination claims that the appellant raised during the processing of his original appeal, the administrative judge deemed the appellant to have abandoned these claims because he failed to raise them again during the prehearing conference. RID at 3. Nevertheless, in the initial decision that dismissed the appellant's original appeal, the administrative judge stated "I will allow appellant to present any nonfrivolous discrimination claims he could have presented in the instant appeal." ID at 3. Given this statement, the appellant may have failed to raise these claims at the prehearing conference because he was under the impression that the administrative judge had already accepted these claims for adjudication. However, even if the administrative judge erred in dismissing these claims, this error did not prejudice the appellant's substantive rights. *Karapinka v. Department of Energy*, 6 M.S.P.R. 124, 127 (1981) (the administrative judge's procedural error is of no legal consequence unless it is shown to have adversely affected a party's substantive rights). Compensatory damages are not available for age discrimination claims. *See Currier*, 72 M.S.P.R. at 196 n.5 (the Civil Rights Act of 1991 does not authorize compensatory damages for age discrimination prohibited by the Age

Discrimination in Employment Act). In addition, even if the appellant had been able to prove his allegation of reprisal for having filed a grievance, he would not have been entitled to compensatory damages because his reprisal claim did not implicate Title VII of the Civil Rights Act of 1964. *See Crosby v. U.S. Postal Service*, 74 M.S.P.R. 98, 106-07 (1997) (compensatory damages are available when the agency has retaliated against an employee for making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing under Title VII). Therefore, the agency's rescission of the original RIF action provided the appellant with all the relief to which he could have been entitled had he been able to raise these claims before the Board.

¶12 Under 5 U.S.C. § 7702(a)(1), an appellant who raises a discrimination claim with respect to any appeal brought to the Board under any law, rule, or regulation is entitled to a hearing and to have the Board decide the merits of such a claim in accordance with the procedures set forth at 5 U.S.C. § 7701. *See Currier v. U.S. Postal Service*, 79 M.S.P.R. 177, 180 (1998). The appellant raised his disability discrimination claim in an appeal brought to the Board under 5 C.F.R. § 351.901, and his outstanding, viable claim for compensatory damages prevented his appeal from being rendered moot by the agency's subsequent rescission of the original RIF action.

ORDER

¶13 Accordingly, we remand this appeal to the Atlanta Regional Office.³ On remand, the administrative judge shall conduct a hearing and shall issue a new

³ In his petition for review, the appellant argues that the administrative judge should have recused herself because she verbally attacked the appellant's representative during a Merit Systems Protection Board training conference held sometime between 1985 and 1987. RPFR File, Tab 1 at 5. We reject this allegation of bias because the appellant did not raise it as soon as practicable after he had reasonable cause to believe that grounds for disqualification existed, and he did not support his allegation with an affidavit. 5 C.F.R. § 1201.42(b); *see Lee v. U.S. Postal Service*, 48 M.S.P.R. 274, 280-82 (1991).

initial decision that decides the appellant's claim of disability discrimination on the merits and provides the appellant with notice of his mixed-case appeal rights. If the administrative judge determines that the appellant has prevailed on his claim of disability discrimination, she shall determine his entitlement to compensatory damages.

FOR THE BOARD:

Robert E. Taylor
Clerk of the Board

Washington, D.C.